ORIGINAL

No. 89-1876

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1989

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STATE OF FLORIDA,

Petitioner,

vs.

JOHNNIE LEE JONES,

Respondent.

==========

ON PETITION FOR WRIT OF CERTIORARI
TO THE FLORIDA SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Respondent rephrases the question presented as follows:

When at a resentencing the trial court imposed a sentence of 25 years imprisonment and the defendant successfully appealed, but on remand a harsher sentence of 50 years was imposed due to a change in Florida law that occurred after the 25 year sentence was imposed, does the Florida Supreme Court's determination that the defendant was penalized for exercising his right to appeal and that only a 25 year sentence can stand present a question of federal Double Jeopardy law which this Court needs to address?

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RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

For purposes of the argument below, respondent accepts the petitioner's statement of the case as substantially correct except as modified by the facts herein.

REASONS FOR DENYING THE WRIT

In 1987, at a resentencing, the trial court sentenced Mr. Jones to 25 years of imprisonment. This sentence was not subject to appeal by the state under Florida law. Mr. Jones did appeal, asserting that the sentence was excessive as a matter of Florida sentencing guideline law. The appellate court agreed Jones v. State, 526 So.2d 173,174 (Fla. 4th DCA 1980) (Jones II).[1] But on remand, the trial court sentenced Mr. Jones to 50 years of imprisonment. Ultimately, in the decision now under review, the

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[1] The state did not seek review of this Jones II decision either in the Florida Supreme Court or in this Court.

Florida Supreme Court held that only a sentence of 25 years imprisonment could be imposed, that the increased sentence was vindictive because it resulted directly from Mr. Jones' exercise of his right to appeal. Jones v. State, 559 So.2d 204 (Fla. 1990).

A. THE DECISION OF THE LOWER COURT RESTS ON STATE LAW GROUNDS.

This cause involves Florida's scheme of sentencing guidelines. Under Florida law there is no basis for the state to appeal the trial court's decision not to sentence the defendant as a habitual offender. Herring v. State, 411 So.2d 966, 971 (Fla. 3d DCA 1982), footnote 1 (Baskin, J., concurring). Senior v. State, 502 So.2d 1360 (Fla. 5th DCA 1987). The state cannot seek the subsequent enhancement of a legal sentence. Gilmore v. State, 523 So.2d 1244 (Fla. 2d DCA 1988); Cherry v. State, 439 So.2d 998 (Fla. 4th DCA 1983); Fasenmyer v. State, 457 So.2d 1361 (Fla. 1984). Although the lower court ruled in part on North Carolina v. Pearce, 395 U.S. 711 (1969), it based its holding on two state law precedents, writing:

> However, as to this petitioner, the double jeopardy principles set forth in North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), prohibit an increase in the sentence imposed at the second sentencing, which the petitioner appealed. The cases relied on by the district court of appeal in Jones III were decided after the trial court imposed the twenty-five year sentence on Jones. Although a change of law subsequently occurred which would have permitted imposition of the initial fifty-year sentence, the district court of appeal would not have had the opportunity to apply that law had the petitioner not appealed the second sentence. Double jeopardy prohibits the increase of the sentence. Brown v. State, 521 So.2d 110 (Fla.), cert.denied, ___ U.S. ___, 109 S.Ct. 270, 102 L.Ed.2d 258 (1988); Troupe

> v. Rowe, 283 So.2d 857 (Fla.1973); Pearce. We agree with the petitioner that, while a departure sentence of more than three-to-seven years would stand because of the Waldron-Roberts rationale, the rationale cannot be used to impose a harsher departure sentence than that imposed in the second sentencing of this petitioner.

The Florida Supreme Court ultimately relying on state law precedents of Brown v. State, 521 So.2d 110 (Fla. 1988) and Troupe v. Rowe, 283 So.2d 857 (Fla. 1973), decided this issue concerning Mr. Jones' sentencing wholly under Florida's sentencing guidelines. Nevertheless, the state now seeks review of this state law issue in this Court. Although the state claims for the first time[2] conflict with the decision in United States v. DiFrancesco, 449 U.S. 117 (1980), the state argues in its petition that the lower court's reliance on state law was misplaced and in conflict with the very state law decisions on which it is based (Petition -11-13).

Examination of the state law precedents on which Jones' decision is based, Troupe v. Rowe, supra, and State v. Brown, supra, reveal that the Florida Double Jeopardy Clause has separate qualities from the Double Jeopardy Clause of the United States Constitution. Florida law recognizes the rule that a sentence may be increased only during the same term of court, that a sentence may not be increased once the defendant has begun to serve it.

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[2] The brief of the petitioner in the Florida Supreme Court is contained in respondent's appendix and shows that petitioner never raised any issue concerning United States v. DiFrancesco. Petitioner's rehearing motion to the decision of the Florida Supreme Court is contained in petitioner's appendix. Petitioner never asserted conflict with DiFrancesco in that pleading either. (Petitioner's Appendix - 2-9).

Troupe v. Rowe, supra. This Florida rule originated independently from constitutional considerations, Beckom v. State, 227 So.2d 232 (Fla. 1969), and is part of the protections against double jeopardy under Article I, Section 19, Florida Constitution. Hinton v. State, 446 So.2d 712 (Fla. 5th DCA 1984).

B. THE DECISION OF THE LOWER COURT IS CONSISTENT WITH NORTH CAROLINA V. PEARCE.

The decision of the Florida Supreme Court in respondent's case is consistent with North Carolina v. Pearce, supra. Pearce held that although there is no constitutional bar to imposing a more severe sentence on retrial after appeal, due process requires that vindictiveness against the defendant for having taken a successful appeal "must play no part in" resentencing; valid reasons for a harsher sentence than previously imposed must affirmatively appear in the record and be based on "objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding." Id. at 725-726.

The Florida Supreme Court specifically determined that the increase in Mr. Jones' sentence resulted from his exercise of his right to appeal: "Although a change of law subsequently occurred which would have permitted imposition of the initial 50 year sentence, the district court of appeal would not have had the opportunity to apply that law had the petitioner not appealed the second sentence." Jones v. State, 559 So.2d at 206. Hence, Mr. Jones was penalized for exercising his right to appeal so that the 50 year sentence is illegal under North Carolina v. Pearce. This is a factual determination of vindictiveness pertaining to a sentencing issue by the state's highest appellate court. As such,

it is a factual finding with which this Court cannot disagree. See Cabana v. Bullock, 474 U.S. 376 (1986).

Clearly, the reason for a harsher sentence advanced by the petitioner here, a change in law to the defendant's detriment which occurred after the time that the lesser sentence was imposed does not square with Pearce's requirements that a defendant not be penalized for exercising his right to appeal.

Jones appealed this second sentence claiming it was contrary to the holding of Shull v. Dugger, 515 So.2d 748 (Fla. 1987), that the 25 year sentence was an unauthorized upward departure from the guidelines recommended range of three to seven years based on new reasons for departure that were not given at the first sentencing hearing. The District Court of Appeal, Fourth District of Florida agreed, and, citing to Shull v. Dugger, remanded for a sentence of not more than three to seven years. Jones v. State, 526 So.2d 173 (Fla. 4th DCA 1988) (Jones II).

Due to a change in the sentencing guidelines law that occurred in Waldron v. Sta[illegible] 529 So.2d 772 (Fla. 2d DCA 1988), decided after the decision in Jones II, which position the state never argued or raised during respondent's second resentencing nor second appeal, the trial court determined not to impose the three to seven years as ordered by the district court in Jones II. Instead, the trial court sentenced respondent to 50 years as an habitual offender giving written reasons for departure and asking the district court to reconsider the propriety of the order to sentence

within the guidelines in light of the new decision in Waldron.[3] When respondent appealed claiming the trial court erred in failing to follow the mandate, the district court approved the rationale of the Second District Court in Waldron and held that after an appellate reversal for failure to follow the guidelines, where the trial court did not realize that the initial sentence was a departure, on resentencing the trial court should have one opportunity to impose a guideline departure sentence giving written reasons for departure, Jones v. State, 540 So.2d 245 (Fla. 4th DCA 1989) (Jones III). In essence, the Florida Supreme Court's decision in Jones holds that one opportunity was the first resentencing at which the 25 year sentence was imposed.

The decision in Jones III represents an exception to the previously established rule that if the trial court sentenced the defendant outside the guidelines solely because it found the defendant to be a habitual offender, then on remand no new reasons for departure could be given and a guideline sentence had to be imposed. Shull v. Dugger, 515 So.2d 748 (Fla. 1987). Pursuant to its discretionary review the Florida Supreme Court approved the rationale of the District Court in Jones III but held that the law prohibited imposition of a harsher sentence of 50 years after the

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[3] Petitioner's claims that "[w]ith the benefit of the clarified case law, upon the second remand, the trial judge reinstated the original sentence imposed on Respondent" (Petition - 13). But these sentences were very different, as the first sentence of 50 years contained no written reasons for departure. An even newer change in Florida sentencing guideline law, occurring after the Florida Supreme Court's Jones decision, now requires that a sentence without written reasons for departure must be reversed to be remanded for resentencing within the guidelines recommended range. Pope v. State, 561 So.2d 554 (Fla. 1990), Ree v. State, 15 FLW S395 (Fla. July 19, 1990).

respondent's successful appeal of his 25 year sentence. Jones v. State, 559 So.2d 204 (Fla. 1990).

The change in law by the Waldron decision occasioned the potential for vindictiveness. Respondent appealed his second sentence of 25 years in the belief that the guidelines constrained the trial judge's ability to depart a second time after the first departure sentence was reversed. Existing case law supported respondent's position. Shull v. Dugger, supra, Jones II. Respondent's "reward" for winning his second appeal from the 25 year sentence was not the three to seven year sentence which the district court ordered and which respondent anticipated, Jones II, but rather imposition of a harsher 50 year sentence under a new provision of law of which respondent had no notice or knowledge at the time he appealed the sentence of 25 years. The decision of the Florida Supreme Court that affirmance of the reimposed 50 year sentence penalized respondent for exercising his right to appeal is completely consistent with Pearce's requirements.

C. THERE IS NO CONFLICT BETWEEN THE LOWER COURT DECISION AND UNITED STATES V. DIFRANCESCO.

The state now claims for the first time a conflict with United States v. DiFrancesco (see footnote 2, supra). However, even had the state cited DiFrancesco to the Florida Supreme Court, that authority would have been unavailing. DiFrancesco contains a prime distinguishing feature, not available to the state under Florida law, which robs the state's argument of any claim of conflict. Although Florida's habitual offender statute is similar to the statute considered in DiFrancesco, it does not authorize a state appeal. Herring v. State, supra. The sentencing court's view on

resentencing that Whitehead v. State, 498 So.2d 863 (Fla. 1986), prohibited reimposition of the habitual offender sentence was not appealable by the state inasmuch as the 25 year sentence was within the statutory maximum. Doe v. State, 492 So.2d 842 (Fla. 1st DCA 1986), Senior v. State, supra.

Respondent's lack of notice or knowledge at the time he appealed his 25 year sentence that the then non-existent Waldron exception would be law two years in the future at the time of resentencing after successful appeal, is another feature of his case that completely distinguishes it from DiFrancesco. In DiFrancesco this Court found no violation of the guarantee against multiple punishments in the Organized Crime Control Act of 1970, which granted the United States the right to appeal a special dangerous offender sentence under specified conditions. Significant to the Court's decision in DiFrancesco was the defendant's awareness that a dangerous special offender sentence is subject to increase on appeal; because the defendant was charged with knowledge of the statute and its appeal provisions, he had no expectation of finality in his sentence until the government appeal was concluded or the time to appeal had expired. Unlike the statutory provisions applicable to DiFrancesco's sentence, here the State of Florida had no right to appeal the respondent's sentence of 25 years. Thus, in appealing that sentence as violative of the established rule of Shull v. Dugger, the respondent had an expectation of finality that the sentence could not be increased due to a change in the law to his detriment. Since the state may not seek to increase a lawful sentence once it is imposed in Florida, the respondent was entitled to pursue his second appeal confident that

a change of law to his detriment could not be applied to him and that no increase in his sentence was possible if he won on an appeal, subject to the protections enunciated in North Carolina v. Pearce.

Respondent submits that the decision below was well-founded based on settled principles of Florida law, and that it is not in the slightest conflict with precedent from this Court on Double Jeopardy protections. Petitioner has failed to demonstrate that any "special and important" reason exists to warrant this Court's attention to the Jones' decision from the Florida Supreme Court. Rule 17.1, Supreme Court Rules.

CONCLUSION

Wherefore, based on the foregoing arguments and authorities cited herein, Johnnie Lee Jones, Respondent, respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully Submitted,

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A P P E N D I X

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IN THE SUPREME COURT OF FLORIDA

CASE NO. 74,004

JOHNNIE LEE JONES,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

****

AN APPEAL FROM THE DISTRICT COURT OF APPEAL OF THE FOURTH DISTRICT

****

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, JOHNNIE LEE JONES, was the defendant, and Respondent, STATE OF FLORIDA, was the prosecution, in the sentencing proceedings held in the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida.

The following symbols will be used:

"PA" - Petitioner's appendix to his brief on the merits.

"Ex" - Exhibit Letter within Respondent's Appendix.

All emphasis has been added by Respondent unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Petitioner was originally sentenced to fifty (50) years imprisonment for the crimes of third-degree murder, grand theft and leaving the scene of an accident. At this sentencing hearing, the State requested that Petitioner be sentenced as a habitual offender (Ex. B, p. 3-5). When given the opportunity to address sentencing concerns, both Petitioner and his counsel indicated they had nothing to say, and that no legal cause existed to prevent imposition of sentence (Ex. B, p. 4). The Circuit Court, the Honorable Judge Stanton Kaplan presiding, made the necessary predicate findings, under §775.084, et seq., Fla. Stat. (1983), that Petitioner had a prior felony conviction, and that the present felonies occurred within 5 years of the prior conviction (Ex. B, p. 5, 6). The Court concluded that habitual offender classification was necessary, for the protection of the public (Ex. B, p. 6), and enhanced Petitioner's sentence to 30 years for third-degree murder, 10 years for grand theft, and 10 years for leaving the scene of an accident, involving death or serious injury (Ex. B, p. 6-8). At a subsequent hearing, held on November 25, 1985, concerning Petitioner's Motion to Mitigate, Petitioner argued that due to the loss of his leg, he was not a threat to the community, and thus should not be classified as a habitual felony offender (Ex. B, p. 10-13). At all times, during the sentencing and mitigation hearing, there were no references

made to guidelines sentencing, no such election by Petitioner, and no such intentions expressed, by the State, or trial court. On appeal from this sentence, Petitioner argued, inter alia, that "the trial court reversibly erred in failing to sentence him under the Rule 3.701 sentencing guidelines," and "the trial court erred in finding and sentencing [him] as a habitual offender" (Ex. F).

Subsequent to this Court's ruling in Jones v. State, 502 So.2d 1375 (Fla. 4th DCA 1987) (hereinafter referred to as "Jones I"), Judge Kaplan held a resentencing proceeding on August 13, 1987 (Ex. C, p. 1-17). The Circuit Court determined the recommended range under the guidelines to be 3-7 years (Ex. C, p. 13). The Court entered three reasons for departure from this range:

> 1) Jones' escalating pattern of criminal conduct, exhibited by two prior burglaries, an attempted strong-arm robbery of an 80-year old woman, including physical contact, and the subject crime, third-degree murder;
>
> 2) The timing of the offense, committed 33 days after Petitioner's release from prison, on the attempted strong-arm robbery conviction; and
>
> 3) Jones' reckless flight from the scene of the crime, which exhibited extreme risk to others.

(Ex. C, p. 13-15). The Court stated that, if any one of these reasons were later held invalid, he would impose the same sentence, based on the remaining valid reasons (Ex. C, p. 15). The judge imposed a 25-year sentence, and rejected the State's

request that Petitioner be classified as a habitual offender. (Ex. C, p. 15). In declining to classify Petitioner in this manner, Judge Kaplan again noted that he initially sentenced Petitioner as a habitual offender, but had not done so as a departure sentence (Ex. C, p. 15-16).

Subsequent to this Court's ruling in Jones v. State, 526 So.2d 173 (Fla. 4th DCA 1988) (hereinafter "Jones II"), the Circuit Court held another resentencing proceeding on August 11, 1988 (Ex. A).

The State maintained that new case law, issued since the Fourth District Court of Appeal's mandate in Jones II, permitted the Circuit Court to classify Petitioner as a habitual offender, and enter a departure sentence beyond the 3-7 year recommended range (Ex. A, p. 4-9). Judge Kaplan reviewed the history of Petitioner's sentencing proceedings (Ex. A, p. 10-21). The Circuit Court judge reiterated that he had initially sentenced Petitioner as a habitual offender, and that based on then-existing case law, did not consider or contemplate that sentence to be a guidelines departure sentence (Ex. A, p. 10-12). Judge Kaplan then concluded that, on the basis of Waldron v. State, 529 So.2d 772 (Fla. 2nd DCA 1988), a departure sentence was permissible and appropriate on resentencing, since no original departure sentence was imposed on Petitioner (Ex. A, p. 18-21). The judge made it clear that he was not imposing the sentence out of any disrespect

SUMMARY OF THE ARGUMENT

I. The Fourth District Court of Appeal's opinion affirming Petitioner's departure sentence was legally correct. As there was originally no departure sentence, the case fell within the recent case law that holds that Shull v. Dugger should be limited to cases where there was originally a departure sentence.

II. By filing a Notice of Appeal, Petitioner invoked the Fourth District's jurisdiction to review the Circuit Court's August, 1988 sentencing ruling. Further, "law of the case" is not a static rule, and need not be applied to correct earlier erroneous rulings and to avoid injustice.

ARGUMENT

POINT I

THE DISTRICT COURT PROPERLY AFFIRMED PETITIONER'S DEPARTURE SENTENCE, SINCE HIS ORIGINAL SENTENCE WAS NOT A GUIDELINES SENTENCE, AND THE REASONS GIVEN FOR DEPARTURE WERE VALID.

Although the Fourth District Court of Appeal originally held in error that the Circuit Court departed from the sentencing guidelines based on Petitioner's habitual offender status (Jones I), it is clear that this was not what was contemplated by the State, Petitioner, or the Court. Since the original sentence was not a guidelines departure sentence, there was no error under Shull v. Dugger, 515 So.2d 748 (Fla. 1987) to depart from the sentencing guidelines upon resentencing. The Fourth District Court of Appeal properly so held.

In his brief on his first appeal, Petitioner argued that the trial court erred by not sentencing him under the guidelines (Ex. F). Petitioner noted that "[t]he guidelines were not mentioned during the sentencing hearing," and there was nothing to indicate that the trial judge ever reviewed the guidelines scoresheet which was part of the supplemental record (Ex. F, p. 3). Thus, Petitioner has already conceded the very point he is attempting to make to this Court.

In response to Petitioner's initial brief in Jones I, the State argued in the alternative that habitual offender status

or disregard for the Fourth District Court of Appeal or its prior rulings, but was seeking that Court's reevaluation of the circumstances of Petitioner's sentencing proceedings, in view of the Waldron decision (Ex. A, p. 18-22, 26). Based on these considerations, Judge Kaplan classified Petitioner as a habitual offender, and imposed a 50-year sentence based on the same departure reasons entered previously (Ex. A, p. 22-26). Judge Kaplan additionally noted that he was imposing such a sentence, in the interest of justice, and in light of the "chaos" and "confusion" over guidelines sentencing (Ex. A, p. 22).

The Fourth District Court of Appeal consolidated Jones II with the appeal from this latest resentencing, and approved the sentence imposed by the Circuit Court. Jones v. State, 540 So.2d 245 (Fla. 4th DCA, 1989) (Jones III). Petitioner sought review of the Fourth District Court of Appeal's opinion, and this Court granted jurisdiction and these briefs follow.

POINTS ON APPEAL

POINT I

WHETHER THE DISTRICT COURT PROPERLY AFFIRMED PETITIONER'S DEPARTURE SENTENCE, SINCE HIS ORIGINAL SENTENCE WAS NOT A GUIDELINES SENTENCE, AND THE REASONS GIVEN FOR DEPARTURE WERE VALID?

POINT II

WHETHER THE FOURTH DISTRICT COURT OF APPEAL ACTED APPROPRIATELY WITHIN ITS JURISDICTION TO CORRECT THE ERROR IN JONES I, AND AFFIRM PETITIONER'S GUIDELINES DEPARTURE SENTENCE?

was a proper basis for a guidelines departure sentence. The State's argument was based upon a presumption for the purpose of argument that there was a guidelines sentence. This position was warranted due to the flux in the status of the sentencing guidelines at the time of this first appeal, and because it was the appropriate response to the way Petitioner framed his arguments.

It is clear from a review of the three transcripts of the sentencing hearings that at the time of the original sentencing, Petitioner, his attorney, the assistant state attorney, and the trial judge did not contemplate that Petitioner was being sentenced under the guidelines (Ex. A, B, C). Therefore, Shull v. Dugger does not apply to the instant case, as Petitioner was sentenced originally outside the guidelines as a habitual offender. There was no departure sentence. It was through recognition of this that the Fourth District Court of Appeal held that Shull v. Dugger was not controlling. Jones III. Morganti v. State, 524 So.2d 641 (Fla. 1988), is also distinguishable from the case at bar since in Morganti habitual offender status was originally given as a guidelines departure reason.

At the August 11, 1988 sentencing hearing (Ex. A), Judge Kaplan specifically observed that in his initial sentencing of Petitioner, he had invoked the habitual felony offender statute

by itself to sentence Petitioner, and that habitual offender status was not used as a guidelines departure reason (Ex. A, p. 10-11). Judge Kaplan related that he had applied the habitual felony offender statute, and entered the required findings of the existence of three prior violent felonies committed by Petitioner within a 5-year period, to extend the maximum penalties of Petitioner's three crimes (for murder, 15 to 30 years; grand theft, 5 to 10 years, and leaving the scene of an accident involving death or serious personal injury, from 5 to 10 years), for a total of 50 years (Ex. A, p. 11). The Circuit Court emphasized that "at that time, the State did not request, nor did I suggest, that these grounds of habitual offender status were grounds for aggravation under the guidelines" (Ex. A, p. 11).

A review of both prior sentencing hearings, on November 12, 1985 (Ex. B) and August 13, 1987 (Ex. C), completely substantiates the conclusion that Judge Kaplan's original offender sentence did not involve a departure sentence. The State requested that Petitioner's sentence be enhanced as a habitual felony offender to 50 years, and made no reference to the guidelines (Ex. B, p. 2-5). Judge Kaplan made the necessary predicate factual findings, and sentenced Petitioner to 50 years as a habitual felony offender, with no reference to guidelines or guidelines departure (Ex. B, p. 5-8). The record shows no guidelines scoresheet was prepared or referred to, and defense

counsel made no request of or reference to guidelines sentencing (Ex. B, p. 4). Subsequently, at Jones' second sentencing hearing in August, 1987 (Ex. C, p. 1-17), Judge Kaplan, in declining to find Appellant to be a habitual offender, recalled that the had "already declared him a habitual offender, but not as grounds for aggravation" of sentence (Ex. C, p. 15-16).

At the time of Petitioner's original sentencing, it was permitted to sentence a defender under the habitual offender status, outside of the sentencing guidelines. Gann v. State, 459 So.2d 1175 (Fla. 5th DCA 1984); Brady v. State, 457 So.2d 544 (Fla. 2nd DCA 1984). That Petitioner was not sentenced under the guidelines is also supported by the fact that there were no written reasons given for the departure sentence, which was required for a guidelines departure at the time of his sentencing. See e.g., State v. Jackson, 478 So.2d 1054 (Fla. 1985).

In Waldron v. State, 529 So.2d 772 (Fla. 2nd DCA 1988), the Second District Court of Appeal unanimously held en banc that a guidelines departure sentence was appropriate on resentencing since the original sentence was not considered to be a departure although the appellate court later found that it was. Shull v. Dugger was thus not applicable, and Waldron limited the holding of Shull.

The underlying rationale of Waldron limits Shull to factual circumstances where a trial court initially offered

reasons for departure, and at least one of the reasons is found to be invalid. Shull then forbids a trial court from relying on "new" reasons for departure on re-sentencing. Such limitations are designed to prevent trial courts from obtaining a "second bite of the apple," and from repeatedly imposing newly created reasons to justify the original sentencing. Shull v. Dugger, 515 So.2d at 750. Such concerns are not present when the trial court did not impose a departure sentence to begin with. Waldron; Daughtry v. State, 521 So.2d 208 (Fla. 2nd DCA 1988) (trial court did not enter departure sentence; after sentencing, appellate decision viewed trial court's sentence as departure sentence; on remand, trial court has opportunity to enter departure sentence).

The results and reasoning in Waldron should be applied in this case with equal force. Judge Kaplan clearly did not originally impose a guidelines departure sentence upon Petitioner. As in Waldron and Daughtry, subsequent appellate decisions later determined that the sentence imposed was a departure sentence. Jones I; Jones II. Because Petitioner's present sentence is not an attempt at after-the-fact justification of an original departure sentence, said sentence does not violate Shull. Judge Kaplan's exercise of an opportunity to enter a departure sentence on resentencing is thus entirely appropriate under Waldron, and is not manipulative in effect, under Shull.

Significantly, several recent decisions from the First, Second, Third and Fifth Districts, have adopted Waldron, and have approved departure sentences, imposed on resentencing, in situations quite similar to this case. In Roberts v. State, 534 So.2d 1225 (Fla. 1st DCA 1988), a trial court originally imposed a sentence, based on an incorrect scoresheet. On remand, the trial court imposed a departure sentence. Id. The First District rejected the argument that Shull prevented a guidelines departure resentencing. Id. The Court found that since no original departure sentence occurred, Shull was inapplicable. Id. Roberts has been approved by this Court. Roberts v. State, 14 F.L.W. 387 (Fla. July 27, 1989). In Roberts, this Court specifically approved the opinion of the Fourth District Court of Appeal below. Id. Similarly, in Brown v. State, 535 So.2d 332 (Fla. 1st DCA 1988), a trial court imposed a sentence that it believed to be within the guidelines, and that an appellate court later viewed as constituting a guidelines departure sentence because of application of the guidelines in effect on the date of the crime. Id. The First District determined that, on remand, the trial court could impose a departure sentence, citing Waldron and Roberts in support of its conclusion that the Shull proscriptions were inapplicable. Brown, at 2678.

The Fifth District applied Waldron, with approval, in Dyer v. State, 534 So.2d 843 (Fla. 5th DCA 1988). The trial court

therein imposed a sentence it believed to be within the guidelines, which on appeal was determined to be a departure sentence, because the combined community control and probation term exceeded the guidelines range. The Fifth District determined that, based on Waldron, the trial court could impose a departure sentence on remand, because the trial judge did not originally contemplate or believe he was entering a guidelines departure sentence. Id. The Fifth District panel based this conclusion on examination of the trial judge's statements at the original sentencing proceeding. Id. Similar examination and focus here leads to the exact same conclusion as in Dyer, and requires a similar result.

Petitioner has relied on the Third District's decision in Harrison v. State, 523 So.2d 726 (Fla. DCA 1988. Harrison was disapproved by this Court in Roberts v. State, 14 F.L.W. 387 (Fla. July 27, 1989).

It is therefore clear that in every one of the appellate districts that have considered the issue since Waldron, the appellate courts have unanimously concluded that a trial court may resentence a defendant, by guidelines departure if the court so chooses, if that court did not originally enter or contemplate a departure sentence. This Court has also so held. Roberts; Brown; Wayda; Dyer; Waldron; Daughtry. Each of these decisions has specifically rejected the applicability of the Shull

prohibitions, that Petitioner has relied on here, after determining from the record that the trial judge did not originally impose a departure sentence, or state any reasons for departure. Id. There is little doubt that Judge Kaplan, in his original sentence, did not rely on guidelines departure. Under Waldron, and its progeny, the significant and unanimous weight of present, appellate authorities mandates affirmance of Petitioner's present departure sentence, and rejection of the applicability of Shull, as argued by Petitioner.

Petitioner argues that the State has taken inconsistent positions regarding the propriety of his sentence. The State would remind Petitioner that Respondent has consistently been in the position of responding to Petitioner's arguments, and the rulings of the Fourth District Court of Appeal, which has necessitated alternative arguments. Further, the State has been acting merely as an advocate, and it is the role of the reviewing court to determine whether the trial court acted appropriately. If a trial court ruling can be upheld for any reason, even a reason not articulated by or to the trial court, the reviewing court must affirm the ruling. Stuart v. State, 360 So.2d 406 (Fla. 1978); Caso v. State, 524 So.2d 422 (Fla. 1988). Further, the attorneys for the State could not have been expected to foresee changes in the law. The attorneys for the State would have been shirking their duties to the people of this State, and

most especially to the family of Christine Gregory, the murder victim in this case, if they failed to make every possible argument to support the trial court's rulings.

The opinion of the Fourth District Court of Appeal in Jones III should be upheld by this Honorable Court. Roberts v. State.

POINT II

THE FOURTH DISTRICT COURT OF APPEAL ACTED APPROPRIATELY WITHIN ITS JURISDICTION TO CORRECT THE ERROR IN JONES I, AND AFFIRM PETITIONER'S GUIDELINES DEPARTURE SENTENCE.

Petitioner argues that the Fourth District Court of Appeal was without jurisdiction to consider the merits of the Circuit Court's August 1988 sentencing order due to the earlier issuance of mandate. This argument ignores one basic fact: Petitioner himself filed a Notice of Appeal from the sentencing, which invoked the jurisdiction of the Fourth District Court of Appeal. Petitioner's attempts to argue to this Court that this Notice did not matter, and that he planned to dismiss the appeal are without legal and record support. The plain facts are that Petitioner himself invoked a new appeal, and he ought not to be heard to complain now merely because he did not prevail. Respondent also asserts that it was within the discretion of the Fourth District Court of Appeal to consider the Circuit Court's ruling on a full appeal, and to consider within that appeal the issue of compliance with that court's earlier mandate. Considering the issues during the normal course of an appeal is certainly preferable to ruling without the benefits of a complete record, and full briefing by the parties. It was under these latter circumstances that the Fourth District Court of Appeal issued its order enforcing mandate, an order which was later

vacated. The issuance of mandate in Jones II did not preclude consideration of the merits of the August 1988 sentencing ruling.

Contrary to Petitioner's argument, law of the case doctrine does not inflexibly require that a prior appellate court ruling be absolutely maintained in all situations and circumstances. It is apparent that an appellate court may reconsider a prior ruling to avoid "manifest injustice," correct errors previously made, and address subsequent circumstances or decisions which alter the prior result when applied. Fyman v. State, 450 So.2d 1250, 1252, n. 3 (Fla. 2nd DCA 1984); Preston v. State, 444 So.2d 939, 942 (Fla. 1984); Blackhawk Heating & Plumbing Company, Inc. v. Data Lease Financial Corporation, 328 So.2d 825, 827 (Fla. 1975); Strazzulla v. Hendrick, 177 So.2d 1, 4 (Fla. 1965); Beverly Beach Properties, Inc. v. Nelson, 68 So.2d 604, 607-608 (Fla. 1953) (on motion for rehearing). Such reexamination is particularly appropriate where the Fourth District Court of Appeal's September 14, 1988 ruling enforcing mandate was made without having the benefit of a transcript of the sentencing hearing in which Judge Kaplan set forth his reasoning and reliance on the post-Jones II opinion in Waldron. See, Fyman, 450 So.2d at 1252, n. 3; Blackhawk Heating & Plumbing, 328 So.2d at 827; Strazzulla, 177 So.2d at 4; Beverly Beach Properties, 68 So.2d at 607, 608; see also, Escrow Disbursement Insurance Agency v. American Title & Insurance Company, 550 F. Supp. 1192, 1196-

1197 (So.Dist. Fla. 1982); Compton v. Societe Eurosuisse, S.A., 494 F. Supp. 836, 839, n. 12 (So.Dist.Fla. 1980). Under these circumstances, it would have been erroneous to view "law of the case" as a static rule to prevent merits review by the Fourth District Court of Appeal.

Respondent would again note that on his appeal in Jones I, it was Petitioner himself who argued that it was error not to sentence him within the guidelines. In Jones III, the Fourth District Court of Appeal merely reconsidered this argument. For this reason as well, Petitioner has invited the Court's ruling in Jones III.

Due to the interests of justice, and for the purpose of correcting an earlier error, the Fourth District Court of Appeal acted legally in revisiting its holding in Jones I and Jones II while affirming the departure sentence in Jones III. There was no procedural error, and the opinion of the Fourth District Court of Appeal must stand.

CONCLUSION

WHEREFORE, based upon the foregoing argument and authorities, Respondent respectfully requests that this Court affirm the opinion of the Fourth District Court of Appeal in Jones III.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Brief on the Merits has been forwarded, by courier, to MARGARET GOOD, ESQUIRE, Assistant Public Defender, The Governmental Center, 9th Floor, 301 North Olive Avenue, West Palm Beach, FL 33401, this 2nd day of August, 1989.

Of Counsel

STATE OF FLORIDA
Office of the Public Defender
FIFTEENTH JUDICIAL CIRCUIT
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Honorable Joseph F. Spaniol, Jr.
Office of the Clerk
Supreme Court of the United States
First and Maryland Avenue, N.E.
Washington, DC 20543

September 12, 1990

RE: State of Florida v. Johnnie Lee Jones
Case No. 89-1876

Dear Mr. Spaniol:

I have enclosed the following documents for filing:

1. Respondent's Brief in Opposition;
2. The Appendix thereto;
3. Motion for Leave to Proceed In Forma Pauperis with attached Affidavit;
4. Affidavit of counsel concerning mailing; and
5. Certificate of Service

I appreciate your kind assistance in the filing of these documents.

Very truly yours,

Margaret Good

Margaret Good
Assistant Public Defender

MG/gms
Enclosures

cc: JOAN FOWLER, Esq.
Assistant Attorney General